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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 806 of 1999

in

SPECIAL CIVIL APPLICATIONNo 4191 of 1998

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI
and
Hon'ble MR.JUSTICE J.M.PANCHAL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DY. COMMISSIONER OF POLICE

Versus

SAYARABIBI GULAM RASUL SHEIKH

Appearance:

MR SP HASURKAR for Appellants

MR PJ MEHTA for Respondent

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI
and
MR.JUSTICE J.M.PANCHAL

Date of decision: 11/07/2000

C.A.V.JUDGMENT : (Per : Panchal, J.)

This appeal, which is filed under Clause 15 of the Letters Patent, is directed against judgment dated December 30, 1998 rendered by the learned Single Judge in Special Civil Application No. 4191/98 by which order dated June 26, 1997 retiring the respondent compulsorily from service passed by the competent authority, is set aside.

2. The respondent was appointed as a woman police constable in Woman Police Force, Unarmed, Ahmedabad city on August 22, 1967. In April 1992, she was promoted to the post of 1st Grade Head Constable and at the relevant time was serving at Vadodara. During the course of her service of 30 years, ten punishments were imposed on her of which two were major punishments. Moreover, adverse remarks were also made against the respondent. It was found by the authorities that without getting leave sanctioned, the respondent had left headquarter and remained absent from duty which was treated as leave without pay. Moreover, the service record of the respondent indicated that on number of occasions, she had deserted duty for which she had been reprimanded. Clause (aa) of Rule 161(1) of the Bombay Civil Service Rules empowers the Government to retire a government servant from government service pre-maturely on his/her attaining the age of 50 or 55 years, as the case may be, if the Government is satisfied that it is necessary to do so in the public interest. Accordingly, the case of the respondent was reviewed by the Review Committee six months before she attained the age of 55 years in terms of criteria laid down in Appendix-A to the Government of Gujarat Resolution dated July 28, 1987 relating to pre-mature retirement of government servant under clause (aa) of Rule 161 of the Bombay Civil Service Rules. On receipt of the report of Review Committee, the competent authority passed an order dated June 26, 1997 retiring the respondent compulsorily from service with effect from June 30, 1997 in public interest and gave three months' pay through a cheque dated May 8, 1997 for a sum of Rs.13,734/- enclosed with the order in lieu of three months' notice. The respondent submitted a representation/appeal against the order dated August 11, 1997, but that was turned down. It was the case of the

respondent that as she was promoted to the post of 1st Grade Head Constable in April, 1992, the competent authority was not entitled to take into consideration the punishments imposed earlier as well as adverse remarks made prior thereto while considering her case for compulsory retirement. What was claimed by her was that in the year 1995 she had sought permission to go for Haj Yatra and withdrawn an amount of Rs.60,000/- from her provident fund, but the application for sanction of 70 days' privilege leave which was due to her credit was not granted, but instead, 60 days' leave without pay was granted and, therefore, order retiring her from service compulsorily, having been passed malafide and bad in law, was liable to be set aside. According to her, there was nothing against her on the basis of which an opinion could have been formed that in public interest she was required to be retired compulsorily from service. Under the circumstances, she instituted Special Civil Application No. 4191/98 and prayed the Court to quash the said order.

An affidavit-in-reply was filed by Mr. Mohan Jha, Deputy Commissioner of Police, Vadodara City controverting the averments made in the petition. The averment made by the respondent to the effect that the respondent had worked sincerely and efficiently was controverted and it was pointed out that 10 punishments were inflicted on her during her service career and several adverse remarks were also made against her. In the reply it was stated that the respondent was not able to perform work satisfactorily and had left the headquarters without getting leave sanctioned from the competent authority. What was emphasised in the reply was that the service record of the respondent indicated that on number of occasion she had deserted her duties for which she had been reprimanded and the order compulsorily retiring her from service was not liable to be set aside.

3. The learned Single Judge relied on the decision of learned Single Judge of this Court in Dr. B.R.Kulkarni v. Government of Gujarat & Ors., 19 GLR 1021 and held that adverse remarks/punishment imposed prior to April, 1992 could not have been taken into consideration while considering the case of the respondent for compulsory retirement from service. According to the learned Single Judge, adverse remarks against the respondent for the years 1994, 1995 & 1996 were not adequate and sufficient to enable the Government to form an opinion that it was in public interest to give compulsory retirement to the respondent. The learned

Single Judge was of the view that instances, such as reprimanding her for insubordination with woman P.S.I. or for leaving duty without informing the higher officer or leaving duty during Bandobast etc. were stray incidents which could not have formed the basis for passing the impugned order. The learned Single Judge deduced that the appellants simply felt irked against the respondent because in the year 1995 she wanted to proceed for Haj Yatra and had proceeded for Haj Yatra without obtaining leave, as a result of which the respondent was compulsorily retired from service. In view of the above conclusions, the learned Single Judge has quashed the order compulsorily retiring the respondent from service, by the impugned judgment, which has given rise to present appeal.

4. Mr. S.P.Hasurkar, learned counsel for the appellants submitted that the entire service record of the respondent indicates that she was below average and not only 10 punishments were imposed on her, but several adverse remarks were also made against her and, therefore, the order compulsorily retiring the respondent from service ought to have been upheld by the learned Single Judge. It was pleaded that two out of ten punishments were imposed after fulfledged departmental inquiries and as the order retiring the respondent compulsorily from service was passed on formation of necessary opinion,the petition should have been dismissed by the learned Single Judge. According to the learned Counsel,adverse remarks followed by promotion can be taken into consideration while reviewing the case of an employee for compulsory retirement and, therefore, the view expressed by the learned Single Judge to the effect that adverse remarks prior to April, 1992 could not have been considered by the authorities for passing the order against the respondent, being erroneous should be set aside. What was emphasised was that the competent authority had seen the entire service record of the respondent on the basis of which an opinion was formed that in the public interest it was necessary to retire the respondent compulsorily from service and,therefore, the appeal should be accepted. In support of his submissions, the learned Counsel relied on the decisions rendered in the cases of; (1) Baikuntha Nath Das and another vs. Chief District Medical Officer, Baripada and another, AIR 1992 SC 1020, (2) Union of India v. V.P.Seth and another, AIR 1994 SC 1261, (3) State of Orissa and others vs. Ram Chandra Das, AIR 1996 SC 2436, (4) High Court of Punjab & Haryana, Through R.G. v. Ishwar Chand Jain and another, (1999)4 SCC 579, and (5) State of Gujarat and another vs. Suryakant Chunilal

Shah, (1999) 1 SCC 529.

5. Mr. P.J.Mehta, learned Counsel for the respondent submitted that the respondent has been victimised only because she belongs to minority community and had gone to Haj Yatra, which according to the appellants was illegal, as she had not got leave sanctioned for the same and, therefore, the order of the learned Single Judge being just and fair,should be upheld by the Court in the appeal. According to the learned counsel for the respondent, adverse remarks made and punishment imposed were so trival in nature that the same could not have been made basis for forming opinion that it was necessary in the public interest to retire the respondent compulsorily from service and, therefore,the appeal should be dismissed. The learned counsel emphasised that the order of compulsory retirement from service passed against the respondent is not in terms of Rule 161(1) of the Bombay Civil Service Rules and, therefore, the judgment impugned in the appeal should be confirmed by the Court. In support of his submissions, learned counsel placed reliance on the decisions rendered in the cases of; (1) The State of Gujarat & Anr. v. Suryakant Chunilal Shah, SLR 1998(5) 746, (2) Brij Behari Lal Agarwal v. Hon'ble HIgh Court of Madhya Pradesh and others, AIR 1981 SC 594, (3) R.P.Malhotra v. Chief Commissioner of Income-tax, Patiala and others, AIR 1990 SC 2055, (4) Brij Mohan Singh Chopra v. State of Punjab, AIR 1987 SC 948, (5) Amarsingh R. vs. Union of India & Ors. 2000(1) GLR 41, and (6) Dr. B.R.Kulkarni v. Government of Gujarat & Ors. 19 GLR 1022 GLR 1022.

6. We have heard the learned counsel for the parties and taken into consideration the averments made in the petition as well as service record of the respondent which was made available to the Court by the learned counsel for the appellants. The record of the case indicates that in the year 1995, the respondent was serving at Karelibaug Police Station. At the relevant time, the authority to sanction leave was the Assistant Commissioner of Police, 'C' Division. It is an admitted fact that the respondent had not applied to the Assistant Commissioner of Police,'C' Division for sanction of leave and had left the headquarters. Thus, there is no manner of doubt that the respondent had committed breach of leave rules and, therefore, her absence from duty was treated as leave without pay. The service record further shows that ten punishments were imposed on the respondent out of which two were major punishments. The service

record also makes it clearthat several adverse remarks were made against the respondent. The contention that adverse remarks prior to April, 1992 could not have been taken into consideration while reviewing the case of the respondent, as she was promoted to the post of 1st Grade Head Constable, has no merits at all. It is true that in Dr. B.R.Kulkarni (supra) and Brij Mohan Singh Chopra (supra), a view has been taken that adverse remarks prior to promotion should be treated as washed off or condoned and cannot be made use of while reviewing the case of an employee for compulsory retirement. However, we find that this principle is no longer a good law in view of the subsequent decisions of the Supreme Court on the point. In State of Orissa and others (supra), order retiring compulsorily from service was made after taking into consideration service record and pending departmental inquiry against the employee. It was found that promotion was given even after adverse entries were made. The Supreme Court has held that the fact that promotion was given even after adverse entries were made, is not sufficient to invalidate the order. The petinent observations made by the Supreme Court are as under :-

"It is true that the government servant was allowed to cross the efficiency bar to enable him to avail the benefits to draw higher scale of pay after crossing the efficiency bar. The adverse remarks made are after promotion. Even otherwise, the remarks form part of service record and character role. The record of inquiry on conduct also would be material. Though minor penalty may be imposed on given facts and circumstances to act of misconduct, nevertheless remains part of the record for overall consideration to retire a government servant compulsorily. The object always is public interest. The material question is: whether the entire record of service was considered or not ? It is not for the Court/Tribunal to see whether the decision of the Government to compulsorily retire the government servant is justified or not. It is for the government to consider the same and take proper decision in that behalf. As stated earlier, it is settled law that Government is required to consider the record of service. Merely because a promotion has been given even after adverse entries were made, cannot be a ground to note that compulsory retirement of the government servant could not be ordered. The evidence does not become inadmissible or irrelevant as opined by the Tribunal. What would

be relevant is whether upon that state of record as a reasonable prudent man would the Government or competent officer reach that decision. We find that self-same material after promotion may not be taken into consideration only to deny him further promotion,if any, but that material undoutedly would be available to the Government to consider the overall expediency or necessity to continue the government servant in service after he attained the required length of service or qualified period of service for pension. It is also made clear that in this case, adverse entries were made only after promotion and not earlier to promotion. Compulsory retirement is not a punishment. He is entitled to all the pensionary benefits. Under these circumstances, we are of the considered view that the Tribunal was wholly unjustified in interfering with the decision to retire the respondent compulsorily from service on the aforesaid grounds."

The view that adverse remarks made in confidential report preceded by promotion, constitute a material on the basis of which opinion could be formed to compulsorily retire the employee concerned in public interest has been reiterated by the Supreme Court in H.G.Venkatchaliah Setty vs. Union of India and others, (1997) 11 SCC 366

In view of the above-referred to proposition of law, which is authoritatively settled by the Supreme Court, we are of the considered opinion that no error was committed by the competent authority in taking into consideration the adverse remarks made against or the punishments imposed on the respondent prior to April, 1992 and on that ground alone, the order compulsorily retiring the respondent from service is not liable to be invalidated. It is well settled that compulsory retirement is not a punishment and, therefore, the principles of natural justice need not be followed, nor the provisions of Article 21 need be observed while retiring an employee compulsorily from service. The power is absolute if bonafide opinion is formed. The contention that order was passed malafide, as the respondent belongs to minority community, has no factual basis. The facts of the case indicate that she had not obtained leave before going to Haj Yatra. The respondent belongs to a disciplined force and, therefore, ought to have obtained necessary leave before leaving for Makka Madina. It is relevant to notice that order treating her absence from duty as leave without pay is passed by a

police officer competent to pass the same, which was never challenged by the respondent anywhere.It is not the case of the respondent that the officer who had passed the said order, was able to influence or had influenced the Review Committee or the competent authority which had formed necessary opinion regarding compulsory retirement of the respondent from service. Thus, there is no basis on which one could come to the conclusion that the order retiring compulsorily the respondent from service is malafide. As observed by the Supreme Court in State of Orissa and ors.(supra), what is required to be considered is, whether the entire service record was taken into consideration by the competent authority or not. Here, in the facts of the present case, the appellants have clearly averred in the reply that the entire service record was taken into consideration before passing the impugned order. This averment made on oath is not controverted by the respondent. The adverse remarks for the years 1994, 1995 & 1996 show that the respondent did not know how to investigate a case and her work was unsatisfactory. In compulsory retirement, public interest is the primary consideration. Only honest and efficient persons are to be retained in service, while dishonest, corrupt and dead wood are to be dispensed with. Efficiency is to be assessed on the basis of material on record, of which confidential reports are an important input. Having regard to service record of the respondent, it is difficult to conclude that subjective satisfaction of the competent authority is vitiated or contrary to law. It is well settled that High Court while exercising powers under Art.226 of the Constitution, does not sit in appeal over order retiring an employee compulsorily from service and the High Court can only probe whether decision making process is vitiated in any manner or not. In the instant case, we do not find that the decision making process is vitiated in any manner at all and, therefore, in our view, the learned Single Judge was not justified in setting aside the order by which the respondent was retired compulsorily from service.

In the State of Gujarat & Anr (supra), no material on service record existed on the basis of which opinion could have been formed to retire the respondent in public interest. There was no adverse entry on the character role of the respondent. Moreover, integrity of the respondent was not doubted at any time. Apart from these facts, it was also found that the respondent was given promotion to the post of Assistant Food Controller, but order of compulsory retirement was based purely on account of the respondent's involvement in criminal cases

which were not concluded at all. Under the circumstances, the Supreme Court has held that compulsory retirement order was punitive in nature and illegal. In our considered view, the facts of the present case are quite different and, therefore, the principle laid down in the said decision cannot be made applicable to the facts of the present case. It is not even the case of the respondent that no adverse entry in her character role is made. We have earlier recorded a finding that material exists on service record on the basis of which opinion could have been formed by the Government to retire compulsorily the respondent in public interest. Under the circumstances, the decision rendered in the State of Gujarat and another (supra) does not help the respondent.

The contention that uncommunicated adverse remarks could not have been taken into consideration has no substance. It is true that in Brij Behari Lal Agarwal (supra), the view taken was that when considering the question of compulsory retirement, uncommunicated adverse entries made in confidential reports could not be taken into consideration. However, on review of legal position, a contrary view has been taken by the Supreme Court in; (i) Baikuntha Nath Das and another vs. Chief District Medical Officer, Baripada and another, AIR 1992 SC 1020, (ii) Secretary to the Government, Harijan and Tribal Welfare Department, Bhubaneswar (Orissa) and Anr. vs. N. Pati, AIR 1993 SC 383, and (iii) H.G.Venkatachaliah Setty v. Union of India and others, (1997) 11 SCC 366 and now it is well settled that uncommunicated adverse remarks can be made basis of passing the order of compulsory retirement.

The reliance placed by the learned counsel for the appellants on the decision in R.P.Malhotra v. Chief Commissioner of Income-tax, Patiala and others, AIR 1990 SC 2055 is also of no avail, as in that case rating of appellant for previous years was average and good on the basis of which Screening Committee took a decision that he was not fit for retention in service. The Supreme Court on consideration of A.C.Rs. and order of screening committee concluded that the screening committee could not have come to the conclusion that the appellant had lost utility in service and, therefore, the order of compulsory retirement was quashed. Here in this case, the service record for the years 1994, 1995 & 1996 clearly shows that several adverse remarks were made against the respondent and, therefore, conclusion of the review committee that the respondent was not fit for retention in service cannot be said to be erroneous or

illegal in any manner.

Again, in Brij Mohan Singh Chopra vs. State of Punjab, AIR 1987 SC 948, there was single entry in service record casting doubt on integrity of the employee and, therefore, the order of compulsory retirement was passed. The present case is not of a single entry in service record of the respondent and principle laid down in Brij Mohan Singh's case, therefore, would not apply to the facts of the present case. Similarly, facts of Amarsingh R. (supra) are quite different from the facts of the present case and it is not necessary to refer to the said decision in detail.

The law on the compulsory retirement is now well settled. Subjective satisfaction of the reviewing authority is not open to Court's interference in absence of any malafides. In the present case, review was made by High Power Committee. In absence of any material showing malafides, perversity, arbitrariness or unreasonableness, we are of the opinion that the learned Single Judge erred in setting aside the order of compulsory retirement. An order of compulsory retirement is not an order of punishment. Rule 161 of the Bombay Civil Service Rules authorises the Government to review the working of its employees at the end of their period of service referred to therein and to require the servant to retire from service if, in its opinion, public interest calls for such an order. Whether the conduct of the employee is such as to justify such a conclusion is primarily for the departmental authorities to decide. The nature of the deliquency and whether it is of such a degree as to require the compulsory retirement of the employee are primarily for the Government to decide upon. The Courts will not interfere with the exercise of this power, if arrived at bonafide and on the basis of material available on record. No mala fides have been urged in the present case against the Government. There was material which showed that the efficiency of the respondent was slackening and even 10 punishments out of which two were major, were imposed on the respondent. It is, therefore, not possible to fault the conclusion of the appellants as being malafide,perverse, arbitrary or unreasonable. The result of the above discussion is that the judgment impugned in the appeal will have to be set aside and the appeal will have to be allowed.

For the foregoing reasons, the appeal succeeds. The judgment dated Decemver 30, 1998 rendered by the learned Single Judge in Special Civil Application No. 4191/98 is hereby set aside and quashed. The order dated

June 26, 1997 retiring compulsorily the respondent from service shall be given effect forthwith. The appeal is accordingly allowed, with no order as to costs.

(D.M.Dharmadhikari, C.J.)

(J.M.Panchal, J.)

(patel)